

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 5 February 2009 TRIBUNAL SITTING No. 20 / CASE 2

CASE REFERENCE: 766451/AB

Information provider & area:	The Mobile Generation (TMG), the Netherlands
Service provider & area:	Netsize UK Limited, London
Type of service:	Competition – subscription
Service title:	www.wixawin.com
Service number:	81121
Cost:	£5 joining fee and £4.00 per week
Network operator:	Mobile Operators
Number of complainants:	167

THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER UNDER PARAGRAPH 8.7 OF THE CODE

BACKGROUND

PhonepayPlus received 167 complaints some of which were in respect of an invitation on the social networking site 'Facebook', that requested consumers to either participate in promotions (such as answering questions) in order to find out how smart or sexy they were, or complete a survey in an attempt to win prizes. Upon completion, consumers were instructed to enter their mobile phone number in order to receive their results. The majority of the complainants reported being unaware that this would result in their entry to a subscription service, which had a £5.00 joining fee and a £4.00 weekly charge.

Following an investigation into the service titled "www.wixawin.com" on 28 February 2008, the Executive understood that the service had been updated. The Executive then received complaints regarding the updated service and therefore conducted a formal investigation the updated service.

The Executive received 83 complaints from members of the public between 1 June and 6 October 2008, 37 of which specifically reported to having received unsolicited chargeable messages such as the following:

*Q1, good luck what is the name of the European Union common currency
A) Dollar B) Peseta C) Euro text GAMEA GAMEB or GAMEC to 81121*

*[81121] Which of Bob Geldof's daughters recently married in Las Vegas A Little
Pickie B Peaches or C Bee Gee Text WIN A WIN B or WIN C*

*Which talk show host will be the next face of Covergirl's cosmetics? A Oprah; B
Ellen DeGeneres; or C Larry King. Text WIN A, WIN B or WIN C to 81121*

Fifteen of the complainants stated that they were on the internet when a pop-up appeared asking them to complete an online survey to win prizes, or complete an online IQ test to find out 'HOW SMART ARE YOU?' These complainants were unaware they would be entered into a subscription service and incur a weekly charge if they entered their mobile numbers to obtain their results

The Executive's understanding of how the service operated

The Executive understood the subscription service to be a Trivia Quiz, which consumers interacted with via their mobile phone and which was charged by weekly subscription. Consumers received four questions a week in the form of four text messages, each charged at £1.00, with a weekly cost of £4.00. The service also charged new users a £5.00 registration fee. According to the 'terms and conditions' the quiz operated as follows:

4. Quiz: one of the Services provided by the Provider. By playing the Quiz the User can win Prizes. To enter the Quiz by text message, send an SMS message with the word 'quiz' to 81121. Your entry must be received within the Contest Period. Entries will be rejected if entry is not fully completed and submitted during the Contest Period.

5. Knock Out: by playing the Quiz the User can qualify for the Knock Out. In this Knock Out, you compete with the other remaining contestants for the grand prize. By answering a question incorrectly or by sending in your answer too late, you will be eliminated from the Knock Out Final and you are no longer in the running for the grand prize. Every month Wixawin will award one grand prize.

6. New Round: apart from the grand prize the User can play for additional prizes in the New Round. Every week a New Round starts and a weekly prize can be won. You will receive a text message which contains information about this New Round. Each New Round consists of (4) four questions per week, which will be text messaged to your mobile telephone.

11. Prizes: the prizes that can be won by making use of the Services, such as a Quiz;

5. Subscribing

The User subscribes to the Service by entering their mobile telephone number into the banner of the desired prize. The User will either be required to confirm their subscription by sending a confirmation text message to the appropriate number or a message will be sent to that telephone number containing a PIN code which is to be entered into the designated text field on the banner to confirm subscription

6. No Purchase Necessary; to obtain an entry without purchase send a 100 or more word hand written original essay on "Why you love trivia games" and include your name, address, mobile phone number and/or email address, in a separate envelope with sufficient postage to: WIXAWIN, P.O. Box 76253, The Netherlands. You must indicate the exact name of the contest which you are entering on the top of the essay entry form. No purchase entries must be

received before the end of the Round. Maximum of one entry per person per month by any method. When an entry without purchase is received each selected entrant must first a) correctly answer, unaided, a time-limited mathematical skill testing question to be administered by telephone at a prearranged mutually convenient time, by email or by text message and; b) sign (or if a minor in their Province or territory of residence, have his/her parent or legal guardian sign) a standard declaration and release form confirming compliance with the contest rules, acceptance of the prize as awarded and releasing the Sponsor, its advertising and promotion agencies, the contest judges and their respective officers, directors, agents, representatives, successors and assigns (the "Releasees") from any liability in connection with this contest, the entrant's participation therein and/or the awarding and use of the prize or any portion thereof. If a selected entrant cannot be contacted by sms text message, email or telephone or fails to return the contest documents within the specified time, he/she will forfeit the prize and an alternate eligible entrant may be selected.

The Executive could not find any information within the terms and conditions which identified when the 'Contest Period' began or ended, or what the 'Grand Prizes' or 'Additional Prizes' were.

The Promotions

This service appeared to be promoted both by internet banners and email. The Executive was aware of the following promotions:

- a. Internet banner promotion entitled 'How smart are you?'
- b. Internet banner promotion entitled 'How SEXY are you?'
- c. Pop-up promotion entitled 'Love Calculator'
- d. Email promotion entitled 'Win a £500 ASDA GIFT CARD'
- e. Wixawin Mobile Entertainment homepage www.wixawin.com which in itself is promoted by banner adverts, along the lines of 'Chance to win this iPhone – Get yours now!'
- f. The Pink Pack website

The Executive accessed all the above promotions, except f above.

Joining the Subscription

From the message logs supplied, the Executive understood that consumers could trigger the subscription charges for the service, in one of the following ways:

- i. The consumer viewed one of the above promotions on their computer, entered their mobile number onto the site and immediately followed the on-screen instructions to:

Text OK to 81121', or

- ii. The consumer saw one of the above promotions on their computer, entered their mobile number but did not follow the onscreen instructions. Instead the consumer waited to receive a text message to their mobile, such as:

“Text OK to get your IQ score and confirm your participation in the Wixawin IQ game. 4Qs/week, £1/msg received. £5 to join. Info: wixawin.com.”, or

- iii. The consumer saw one of the above promotions on their computer, entered their mobile number and was then advised to enter a pin number which had been sent to them in an SMS message. For example:

“FreeMsg: Your pin:XXXX. Fill this pin 2 participate in the Wixawin trivia game. Join the weekly quiz, 4Qs/wk £1/msg received, £5 to join. Info: wixawn.com”.

If the consumer entered the pin number on the website, they were subscribed without needing to send a mobile originating (“MO”) message from their handset.

The Executive noted aware that both the service provider and the information provider had requested compliance advice from PhonepayPlus with regard to promotions (a) and (c) above.

Standard Procedure

The Executive conducted the matter as a standard procedure investigation in accordance with paragraph 8.5 of the PhonepayPlus Code of Practice 11th Edition (amended April 2008). The matter later became an information provider case under paragraph 8.7 of the Code.

By 7 January 2009, the Executive had received a total of 167 consumer complaints in respect of the service.

In a letter dated 4 November 2008, the Executive raised potential breaches of paragraphs 5.4.1a, 5.7.2, 7.6.3a, 7.6.3b, 7.12.3a, 7.12.3b and 7.12.4e of the Code. In a letter dated 6 November 2009, the service provider supplied comments regarding the investigation which it request be presented to Tribunal members to consider as mitigating factors. A formal response was received from the information provider’s solicitors Hammonds LLP, dated 19 November 2008, together with signed undertakings on behalf of the service and information provider, indicating the information provider’s intention to accept full responsibility for the service and its promotion. For ease of reference, the responses supplied by the information provider’s solicitors, have been attributed to the information provider throughout.

The Tribunal made a decision on the breaches raised by the Executive on 5 February 2009. The information provider made information representations to the Tribunal on that same date.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

MISLEADING (Paragraph 5.4.1a)

“Services and promotional material must not:

a mislead, or be likely to mislead in any way...”

1. The Executive considered the promotion to be misleading on the basis that consumers were under the impression that they were simply completing an IQ test online, and failed to differentiate between the test and the competition. The Executive noted that in relation to promotions a to d, the consumer was misled into entering a chargeable service which was very different from the one they had initially responded to, such as a Love Match, an IQ Test, a Competition or an answer to How Sexy are you? The Executive considered that the reasonable consumer expectation upon entering their mobile phone number, would be either to receive details of a love match, an IQ score, enter a straightforward prize draw, or find out ‘how sexy’ they were. The Executive considered that in all of these cases, the expectation was defeated, as in order to receive any of the above, the consumer was required to send a trigger word to the short code, which resulted in subscription to a service and their incurring a registration charge. This was exacerbated by the fact that the wording within the promotions appeared to indicate a distinction between the receipt of the IQ score and the quiz:

“Your IQ Score will be sent to your mobile phone. Play the mobile quiz which you join to contest for weekly prizes!”

“Your Sexyness score will be sent to your mobile phone. We will contact you on the number you have entered if you are the winner of the trivia game that you join”

“Your love match will be sent to you mobile phone. We’ll contact you if you are a winner of the mobile love game that you join”.

“To enter our prize draw! Click Below!”

The Executive considered that each of the above statements indicated that the quiz element of the service was one which consumers might later be invited to join, but were not automatically subscribed to. In the case of the love calculator promotion, the defeated consumer expectation was further aggravated by referring to the trivia quiz as a ‘mobile love game’. The Executive also noted a further aggravating factor, being that compliance advice previously supplied in respect of promotions a and c, which raised concerns in respect this potential confusion, had not been implemented by the information provider, and formed the basis of consumer complaints.

2. The information provider responded that the need to subscribe to the service was made clear i) at the top of each webpage, ii) immediately below the box where consumers entered their mobile number, iii) in the material terms printed on each webpage, iv) in the FAQ section of the website and v) also in the detailed terms

and conditions. The information provider contended that consumers were accustomed to such services and would be well aware of its nature. Similarly, an SMS notification also made it clear that it was a subscription service. The information provider disagreed that the subscription element was not made clear to consumers because for the following reasons:

- a) There was a prominent notice at the top of each section of the website stating that the various tests were part of a subscription service. For example: “This is an advertisement – the [how sexy are you] test is part of the Wixawin trivia subscription service”.
- b) The terms and conditions immediately below the relevant box on each website clearly stated, for example, that “if you enter the received pin or respond to us with an SMS, you will receive your IQ score and join the Wixawin Trivia Game subscription service”. The information provider noted that the PhonepayPlus compliance team had indicated (by email and subsequently in telephone conversations) that this would be sufficient to meet all its concerns in relation to this aspect of the promotion.
- c) The website notices were supplemented by the fact that the first free SMS notification received by the consumer after entering their details into the website (and before subscription commenced), clearly indicated that the service was subscription based.
- d) Providers of ‘one off’ services commonly marketed their services as such. Due to the information provider’s experience in the market and the fact that the service was not promoted as a “one-off”, it considered that consumers would appreciate the service was subscription based.
- e) The FAQ section of the website contained a clear guide to the fact that the service was subscription in nature,
- f) Most internet and mobile phone users of the type enjoying the service were accustomed to the subscription based platform from which such services were widely offered.

The information provider commented that it worked with carefully selected third parties to promote the service via banner advertisements on various third party websites. It commented that it could not be held responsible for any failings on the part of its suppliers to accord with the terms of their contracts and the Code. The wording “to enter out prize draw! Click Below!” did not include the requisite information about the Service, was not displayed by or with the authority of the information provider.

3. The Tribunal considered the evidence and found that complainants had been unaware that they were entering into a subscription service when entering their mobile number for another purpose and had been misled into doing so. The Facebook promotion and the design of the landing page failed to state the subscription element of the service with sufficient prominence to avoid consumers being misled. The Tribunal considered that the strap line at the top of the page which stated “This is an advertisement” and that the relevant promotion “was part of the Wixawin Trivia Subscription Service”, to be insufficient. The Tribunal also noted that approximately 80% of consumers unsubscribed from the service within a very short period of time, which was an indication that they had

not deliberately subscribed. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

PRICING INFORMATION (Paragraph 5.7.2)

“Written pricing information must be easily legible, prominent, horizontal and presented in a way that does not require close examination. Spoken pricing information must be easily audible and discernible.”

1. The Executive raised this complaint only in relation to the ‘Love Calculator’ service. In this service, when the computer screen was in full resolution, consumers were required to scroll down, in order to view the pricing information. The Executive raised concerns that consumers could complete all five steps of the process and enter their mobile phone number, without scrolling down. Consumers would therefore be unaware of the cost of the service, until receipt of the subscription initiation message. However, during the Executive’s monitoring of the service, it instantly received four text messages a cost of £6.20, and was therefore charged prior to realising there was a cost.

The Executive also noted the content of previous compliance advice supplied by PhonepayPlus, which specifically referred to the need to avoid scrolling down in order to view terms and conditions, and had suggested they were moved up the page. The Executive visited the website www.wixawin.com and noted that the following promotions also required consumers to scroll down in order to view the terms and conditions which contained pricing information: GHD Gift Vouchers, H&M Gift Voucher, Pink Pack, Nintendo wii and wiifit, What’s your Body Mass Index?, Petrol Voucher and Shopping Voucher. The Executive acknowledged the difference with the wixawin website, on which, prior to clicking into a promotion, it is clearly stated at the top of the page:

*“To participate: sign up via the website
Cancellation: text STOP to 81121 or use our unsubscription form
Subscription: 4 questions per week*

*Age: Min. age 18+ and bill payer’s permission
Costs: £1 per message received, a sign-up fee of £5 will apply”*

However, the Executive raised concerns that these services could have the same failings as the ‘Love Calculator’ service and be promoted on other websites, or as pop-ups on Facebook or You Tube.

2. The information provider stated that on a standard size screen, consumers could see the pricing and subscription information without scrolling down. It commented that in any event, consumers knew that when they were using a small screen, they would have to scroll to see all the text, and were in the habit of doing this. The scroll bar and overall presentation of the website indicated that there was additional text where this was the case.

The information provider commented that the visibility of the material information (e.g. pricing), depended on the size of the computer monitor. When viewed on a standard 22" diagonal screen, all the material information within the 'on screen disclaimer' was visible. The information provider believed the same to be true for a 19" monitor, probably the most common size purchased for home use. The size of consumers' screens was totally outside the control of the information provider, and it considered that consumers were aware that small screens required more scrolling (such as mobile phones or other handheld devices). The information provider further commented that implicit in the Executive's criticism about the visibility of terms and conditions was the assertion that consumers would not normally scroll down a page during the course of using the internet. The information provider considered that this substantially underestimated the sophistication of the average user of the service who would be, by definition, someone familiar with using the internet and a browser. The information provider also commented that the text of the disclaimer was displayed directly under the image; no space had been left in between the image and the text.

The information provider's comments in response to the alleged breach of paragraph 5.4.1a above regarding the prominence of the subscription element of the service, were also considered by the Tribunal.

3. The Tribunal considered the evidence in respect of the Love Calculator promotion and determined that the pricing information was not easily legible, prominent and presented in a way that does not require close examination, in that it required the consumer to scroll down the page to read properly. The Tribunal noted the 'strap line' at the top of the page which read "This is an advertisement – the IQ test is part of the Love Calculator Subscription Service", failed to contain any pricing information, was not prominent and required close inspection. The Tribunal upheld a breach of paragraph 5.7.2 of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

COMPETITIONS AND OTHER GAMES WITH PRIZES (Paragraph 7.6.3a & b)

"Promotional material must clearly state any information which is likely to affect a decision to participate, in particular:

- a any key terms and conditions, including any restrictions on the number of entries and prizes which may be won,*
- b an adequate description of prizes and other items offered to all or a substantial majority of participants, including the number of major prizes and details of any restriction on their availability or use,"*

1. The Executive considered that information on how the competition operated, conditions of entry and as to how consumers qualified to win one of the prizes, was likely to affect a consumers' decision to participate, but was not clearly stated on the promotional material. The Executive's interpretation of the service from the small print at the foot of the promotional material was that the quiz

operated in a manner which required the consumer to answer four questions, in order to qualify for a prize. However, on each of the websites in the bottom right hand corner below the small print, there were hyperlinked 'Terms and Conditions' which when clicked, took the user to a long page of text which included the following statements:

To enter the Quiz by text message, send an SMS message with the word 'quiz' to 81121. Your entry must be received within the Contest Period. Entries will be rejected if entry is not fully completed and submitted during the Contest Period.

5. Knock Out: by playing the Quiz the User can qualify for the Knock Out. In this Knock Out, you compete with the other remaining contestants for the grand prize. By answering a question incorrectly or by sending in your answer too late, you will be eliminated from the Knock Out Final and you are no longer in the running for the grand prize. Every month Wixawin will award one grand prize.

The Executive considered that the above information should be made clearer to consumers, instead of being located in a discreet location at the very bottom of the page (which in some cases required scrolling in order to view) and which appeared in a separate screen to the promotion itself.

To further aggravate the situation, the Executive found the information within the terms and conditions unclear, as it failed to provide any information on when the 'Contest Period' started or ended. Without this information, the consumer was unable to make an informed decision about whether they submitted their entry in time. The terms and conditions informed consumers that in order to remain 'in the running' for the grand prize they must answer questions correctly (although the number of questions which they had to answer was not specified), and that they were competing against other contestants. However, there was no information about how this would work in practice, how it was monitored and how other contestants could be knocked out. Furthermore, it failed to indicate when an answer was 'too late'.

The Executive also noted that the terms and conditions on the promotions stated:

"The competition costs £1 (GBP) for each text message that you receive from us (this amount includes a handling fee and technical costs) until you send STOP to 81121 (plus a £5.00 sign up fee). Sent text charged at standard operator fees. If you enter the received pin or respond to us with an SMS, you will receive your IQ score and join the Wixawin Trivia Game subscription service. Subscribers are able to win weekly prizes (worth approx. £150 to £200) by playing the weekly Trivia Game. Competition ends 31-12-08. The prize will be distributed by Wixawin within 60 days of the win. By entering the activation PIN code into the text field on the banner or by responding to us with an SMS to confirm sign up through our website, customers are agreeing to subscribe. By signing up for and/or using the service you acknowledge and confirm that you have read the terms & conditions, that you are a resident of the United Kingdom,

you are 18 years or older and are the authorized account holder or that you have the consent of the account holder. The weekly Trivia Game consists of 4 questions. Wixawin is a product of TMG (P.O. Box 76253, 1070 EG, The Netherlands) and offers innovative information and entertainment for your mobile. Helpdesk: 08707502929 or info.uk@wixawin.com

The Executive noted that although the terms and conditions stated “win weekly prizes (worth approx. £150 to £200) by playing the weekly Trivia Game”, consumers were not given an adequate description of what the prizes would be.

The Executive also observed that the terms and conditions stated:

“5. Knock Out: by playing the Quiz the User can qualify for the Knock Out. In this Knock Out, you compete with the other remaining contestants for the grand prize. By answering a question incorrectly or by sending in your answer too late, you will be eliminated from the Knock Out Final and you are no longer in the running for the grand prize. Every month Wixawin will award one grand prize.”

The Executive noted the repeat reference to the ‘grand prize’. However this failed to provide an adequate description of the prizes participants could win, which might affect a decision to participate.

2. The information provider commented that the relevant information was included in both the webpage and also in the detailed terms and conditions. A further description of the prizes was contained in free SMS messages sent to consumers. The information provider asserted that all material information was easily readable and in sufficiently large text. The colour schemes (e.g. black text on white background) were carefully chosen, in close consultation with the PhonepayPlus compliance team, to ensure that text was easily legible.

The information provider offered its assurance that no consumers were disadvantaged by the requirement to enter within the ‘Contest Period’ because such periods operated “back to back” and any entry which missed the deadline for one competition, was immediately entered in the next. The end date for the competition was clearly stated on the webpage as “Competition ends 31-12-08”. Information as regards how the competitions operated and how prizes were won were included, not only in the detailed terms and conditions accessed via a prominent link at the foot of each page, but also in the material information included immediately below the images (the on screen disclaimer).

With regard to the identification of prizes, the information provider pointed out that the prizes varied from time to time. The general level of prize (expressed in monetary terms) was given both in the screen disclaimer on each page and in the fuller terms and conditions, accessed by the link from each page. All subscribers to the service received a free SMS message advising them of the exact nature of the prizes, which allowed consumer to unsubscribe if a particular prize did not interest them. The grand prize, an iPhone, was specified on the

website. In addition, all consumers who subscribed to the service received a free weekly SMS advising them of the prize for the forthcoming week.

The information provider noted the criticism which is made by the Executive that the wording "subscription for 4Qs/week, £1/msg received until you send STOP to 81121" was not sufficiently clear. The information provider found it hard to understand how this phrase could be interpreted as having any other meaning than that there would be four questions per week, each in a separate message at a cost of £1.00 for each question, until STOP was sent to the short code. The information provider also noted that the wording had been present in the service throughout the period of consultation with the PhonepayPlus compliance team. No criticism of the language was raised during that period. The information provider also emphasised that it was limited by the amount of space it has to display such messages, on top of graphics and images in prominent sections of the website. Accordingly, it was common in the industry to use standard abbreviations to convey the message clearly. The information provider considered that it knew its market well, and believed that consumers would fully understand the abbreviations used.

3. The Tribunal considered the evidence and determined that the terms and conditions of the service were complicated, and were by no means clearly stated to consumers, as required by paragraph 7.6.3a of the Code. The Tribunal also considered that the description of prizes was opaque and unsatisfactory. The Tribunal considered that the relevant information was likely to influence a consumers' decision to participate in the service. The Tribunal upheld a breach of paragraphs 7.6.3a and b of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

SUBSCRIPTION SERVICES (Paragraph 7.12.3a & b)

"Promotional material must:

- a clearly indicate that the service is subscription based. This information should be prominent and plainly visible and/or audible to consumers,*
- b ensure that the terms of use of the subscription service (e.g. whole cost pricing, opt-out information) are clearly visible and/or audible,*

1. The Executive raised this complaint in relation to the 'love calculator' promotion. In full screen resolution, the promotional screen cut off below the picture box of the boy and girl, and in order to view all the terms and conditions, the Executive had to scroll down. The Executive noted that all five steps of the promotion could be completed, without the terms and conditions being visible. The Executive raised concerns that if a consumer did not scroll down, they might be misled into thinking the service was free, without realising that by entering their mobile phone number they would be entered into a chargeable subscription.

The Executive noted the previous compliance advice given, which addressed concerns in respect of the promotion and service, including consumers being misled into the subscription service, the font colours making the terms and

conditions difficult to read, the fact that the terms and conditions stated that consumers could enter to win an iPhone, but failed to clarify how the service worked, and compliance advice in respect of making the terms and conditions more prominent, to avoid consumers being unaware of the subscription element of the service. In an separate email, the Executive stated that the majority of concerns had been addressed, but the need to scroll down on the “Love Calculator” and “Pink Pack” had not been resolved, again it was suggested that these amendments be made to ensure that consumers did not miss the salient information

The Executive noted that at the top of the promotion was the following sentence in small text:

“This is an advertisement – the Love Calculator service is part of the Wixawin Trivia Subscription Service”.

It is the opinion of the Executive that this sentence did not fully or clearly inform participants that by completing the five stages, they would be entered into a chargeable subscription service (unless they scrolled down to see the terms and conditions).

The Executive noted that the promotional and subscription initiation messages provided pricing information in the following format:

“Subscription for 4Qs/week, £1/msg received until you send STOP to 81121.”

The Executive raised concerns that this failed to clearly explain that: ‘Q’ meant question, that only one question would be sent in each text message and that the consumer would be charged a total of £4.00 per week, until sending ‘STOP’ to the service.

2. The information provider reiterated that on a standard size screen consumers could see the pricing and subscription information without scrolling down. It considered that consumers knew that when they were using a small screen they would have to scroll down in order to see all the text, and were in the habit of doing this. The information provider stated that the scroll bar and overall presentation of the website indicated where there was additional text. The information provider reiterated its previous responses to the alleged breaches of paragraphs 5.4.1a and 5.7.2 of the Code. The information provider also reiterated its comments contained in the last two paragraphs of its response to the alleged breach of paragraph 7.6.3a and b, in respect of its use of unclear wording and abbreviations, and the limitations it faced in displaying such information in a prominent place on its website.
3. The Tribunal considered the evidence and determined that the strap line was not sufficient to inform consumers that the service was subscription based, as it was neither prominent nor plainly visible. The Tribunal upheld a breach of paragraph 7.12.3a of the Code. However, the Tribunal did consider that the terms of use

were clearly visible, when accessed. Therefore the Tribunal did not uphold a breach of paragraph 7.12.3b of the Code.

Decision: UPHeld (7.12.3a) NOT UPHeld (7.12.3b)

ALLEGED BREACH FIVE

SUBSCRIPTION INITIATION (Paragraph 7.12.4e)

“Users must be sent a free initial subscription message containing the following information before receiving the premium rate service:

e how to leave the service,

1. The Executive noted from message logs supplied by the service provider, that in respect of two mobile numbers, the first free message said:

FreeMsg: Your pin: XXXX. Fill in this pin 2 participate in the Wixawin trivia game. Join the weekly quiz, 4Qs/wk, £1/msg received, £5 to join. Info: wixawin.com

The Executive noted that the free subscription initiation message failed to inform users how to leave the service. After receipt of this free message, consumers received a chargeable message.

2. The information provider argued that the paragraph had not been breached on the basis that message referred to in the breach letter was an invitational security measure, sent to consumers before joining the service. Once consumers had confirmed that they wished to subscribe to the service, they would then receive an initial free SMS message which informed them how to unsubscribe.

The information provider commented that consumers received two free SMS messages. The first was an invitation SMS, sent to ensure that the number entered into the website belonged to the person who wished to subscribe to the service. The copy for such an SMS typically read as follows:

TreeMsg: Your pin: XXXX. Fill in this pin 2 participate in the Wixawin trivia game. Join the weekly quiz, 4Qs/wk, £1/msg received, £5 to join. Info: wixawin.com”

At that point the consumer had not yet subscribed to the service. Contrary to the Executive’s assertions, a chargeable message would only have been received following this message and had the user entered his or her PIN into the website. The information provider emphasised that it did not charge consumers until they had confirmed that they wished to subscribe to the service.

Secondly, after subscribing to the service, but before receiving the first chargeable SMS, the consumer received an initial free SMS, typically in the following terms:

"Thanks! U've joined the Wixawin Quiz for the iPhone + weekly prizes for £1/msg received until u send stop to 81121. 4 Qs/week. Help: 08707502929/wixawin.com"

The information provider submitted that it had complied with paragraph 7.12.4e, on the basis that consumers had been sent a free initial subscription message containing information about how to leave the service, before being sent the premium rate service.

3. The Tribunal considered the call logs supplied by the service provider, and noted that the free and charged messages had been sent so closely together, that some were received out of order. This had the consequence that the first message that some users received after subscribing was not free and did not contain the required information, contrary to the requirements of paragraph 7.12.4. The Tribunal noted that the Code does not impose a requirement regarding the order in which the relevant messages are sent but the order in which they are received. It is the duty of the information provider to so arrange its systems as to comply with this requirement of the Code. The Tribunal upheld a breach of paragraph 7.12.4e.

Decision: UPHELD

SANCTIONS

The Tribunal's initial assessment was that, overall, the breaches taken together were **serious**.

In determining the sanctions appropriate for the case the Tribunal took into account the following aggravating factors:

- The information provider was deliberate in its operation and promotion of the service;
- There was material consumer harm (167 complaints);
- The cost paid by individual consumers was high (£5.00 joining fee and £4.00 per week); and
- Non-compliant subscription services have been singled out for criticism by PhonepayPlus.

In mitigation, the Tribunal noted the following factors:

- The information provider sought compliance advice on this and a similar service, following instructions from a Tribunal in a previous adjudication;
- The information provider cooperated with PhonepayPlus when notified of the breaches. It did not stop the service, but amended the original promotions; and
- The information provider stated that it has issued refunds to complainants.

Taking into account the aggravating and mitigating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **serious**.

The Tribunal therefore decided to impose the following sanctions:

- A formal reprimand;
- A £100,000 fine in respect of the upheld breaches. The Tribunal commented that it had not applied an uplift in respect of the information provider's breach history, having regard to the information provider's engagement in ongoing compliance advice, as required in a previous adjudication.
- The Tribunal ordered a bar on this service, and any related promotional material, for one month or until the information provider seeks and implements compliance advice, whichever is the longer.
- The Tribunal also ordered that claims for refunds are to be paid by the information provider for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.